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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MANUEL LEYVA LOPEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIQ,
Assistant U. S. Attorney,
Chief, Criminal Division,
ARNOLD G. REGARDIE,
Assistant U. S. Attorney,

1221 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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1221 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant, MANUEL LEYVA LOPEZ (hereinafter referred to as Lopez), was indicted, together with Ernest Garcia De La Rosa, by the Federal Grand Jury for the Central District of California on April 12, 1967 [C. T. 2-4]. ^{1/} The indictment, in three counts, charged De La Rosa and Lopez with possession, sale and unlawful transfer of 10.180 grams of heroin.

^{1/} "C. T. " refers to Clerk's Transcript, filed July 24, 1967.

Lopez and De La Rosa were arraigned on April 17, 1967 before the Honorable E. Avery Crary, United States District Judge; at this time Lopez was represented by Solomon Kleinman, appointed counsel [C. T. 6]. Lopez and De La Rosa entered a plea of not guilty to all counts of the indictment and the case was transferred to the Honorable Charles H. Carr for trial setting. On April 17, 1967, Lopez and De La Rosa appeared before Judge Carr at which time trial was set for Tuesday, May 9, 1967 [C. T. 7].

On May 9, 1967, Lopez and De La Rosa again appeared with counsel before the Honorable Charles H. Carr [C. T. 35]. On this date a jury was selected and trial commenced. On May 10, 1967, both Lopez and his co-defendant were found guilty on all three counts [C. T. 41].

On September 25, 1967, Lopez was sentenced to the custody of the Attorney General for a period of seven years on each of Counts One, Two and Three, said sentences to run concurrently with each other [C. T. 9]. ^{2/}

Notice of Appeal was filed September 25, 1967 [C. T. 10].

Jurisdiction of the District Court was based on Title 21, United States Code, Section 174, Title 26, United States Code, Section 4705(a), Title 18, United States Code, Section 3231 and Rule 18, Federal Rules of Criminal Procedure. This Court has jurisdiction to review the judgment of the District Court pursuant

^{2/} C. T. refers to Clerk's Transcript filed May 6, 1968.

to Title 28, United States Code, Sections 1291 and 1294 and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATEMENT OF FACTS

Count Two of the indictment charges Lopez and his co-defendant with possession of 10.180 grams of heroin in Los Angeles County on December 27, 1966. Counts One and Three charged the sale and unlawful transfer, respectively, of this same heroin to Agent Frank Figueroa of the Federal Bureau of Narcotics on or about December 27, 1966, in Los Angeles County. The Government's case was based mainly on the testimony of the chemist, Julian Grooms [R. T. 32-41], ^{3/} who testified that he analyzed the powder purchased by Agent Figueroa and concluded that it was heroin, and on the testimony of Agent Figueroa of the Federal Bureau of Narcotics, who testified concerning negotiations and the actual transfer of 10.180 grams of heroin from Lopez and De La Rosa to himself [R. T. 54-72].

Agent Figueroa testified that on December 27, 1966, he was at the Federal Bureau of Narcotics office with Alfonso Masias, the informant in the case [R. T. 56], who was deceased at the time of the trial [R. T. 75/12-13]. The informant placed a telephone call to Lopez which was monitored by Agent Figueroa with

^{3/} "R. T. " refers to Reporter's Transcript.

the consent of the informant [R. T. 56/16-17; 76/6-9]. This was done by means of a non-magnetic, non-electronic extension device that was attached to the phone receiver [R. T. 57/25; 58/1-6; 108/14-25; 109/1-8]. Agent Figueroa's testimony in this regard was objected to by Mr. Kleinman, counsel for Lopez, on the ground of hearsay and "tapping the telephone call" [R. T. 57/2-3; 58/20-25]. This objection was overruled by the court [R. T. 59/1-3]. At the close of the Government's case Mr. Kleinman moved for a judgment of acquittal on the grounds that Agent Figueroa's testimony in this connection was not competent evidence [R. T. 127/21 - 128/21]. The motion was denied [R. T. 129/25 - 130/1]. It is to be noted that no pre-trial motion to suppress under Rule 41(e), Federal Rules of Criminal Procedure, was filed in this connection.

Agent Figueroa, continuing his testimony, stated that during the conversation between the informant and Lopez, he overheard the informant arrange with Lopez for the purchase of "two quarters" of heroin, at a price of \$50 a quarter [R. T. 59/19 - 60/7]. Following this conversation the informant and Agent Figueroa drove to the residence of Lopez. Here they found Lopez and his co-defendant De La Rosa. After making a telephone call, Lopez directed that the four of them drive to Whittier Boulevard and Burger Streets in East Los Angeles where they would receive the heroin. Upon arriving at the above location, De La Rosa received \$100 from Agent Figueroa and went into a nearby alley. In a few minutes he returned and the four of them drove back to

the residence of Lopez. They all re-entered this house and Agent Figueroa was given the package containing heroin by De La Rosa after Lopez had looked at it to see if it was the correct weight.

III

QUESTION PRESENTED

DID THE TRIAL COURT COMMIT ERROR IN ADMITTING INTO EVIDENCE THE TESTIMONY OF AGENT FIGUEROA RELATING TO THE TELEPHONE CONVERSATION HE OVERHEARD BETWEEN THE INFORMANT AND THE DEFENDANT LOPEZ?

IV

ARGUMENT

THERE IS NO FOURTH AMENDMENT VIOLATION WHERE EVIDENCE IS SECURED BY MEANS OF A MECHANICAL LISTENING DEVICE WHERE IT APPEARS THAT ONE OF THE PARTIES TO THE CONVERSATION CONSENTED TO ITS BEING OVERHEARD.

Lopez concedes that the consent of the informant to overhear their conversation removes it from the operation of Section 605 of the Federal Communications Act.^{4/} (Appellant's Brief

^{4/} 47 U. S. C. Section 605.

9/5-6). Indeed there can be no question that the contents of a communication overheard by a police officer on a telephone extension with the consent of a party to the conversation, are admissible in federal court.

Rathbun v. United States, 355 U. S. 107 (1957).

Although the conversation in Rathbun was overheard by means of an extension telephone and not a listening device as used in the instant case, the principle of that case clearly applies to the case at bar. In holding on the facts of the case that there was no "interception" of a telephone message, as Congress intended the work to be used in Section 605 of the Federal Communications Act, the court quoted from the statute as follows:

"No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. "

The court went on to say that,

"[t]he clear inference is that one entitled to receive the communication may use it for his own benefit or have another use it for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone. "

Rathbun v. United States, supra, at p. 110.

The Rathbun rationale has been followed in previous Ninth Circuit decisions.

Lindsey v. United States, 332 F.2d 688, 691
(9th Cir. 1964);

McClure v. United States, 332 F.2d 19
(9th Cir. 1964);

Wilson v. United States, 316 F.2d 212
(9th Cir. 1963);

Carbo v. United States, 314 F.2d 718
(9th Cir. 1963).

Thus, the only issue to be considered in this appeal is whether the actions of Agent Figueroa in overhearing the conversation between Lopez and the Informant constituted an unreasonable search and seizure within the context of the Fourth Amendment. In Katz v. United States, 19 L. Ed.2d 516 (1967), the Supreme Court extended the protection of the Fourth Amendment to cover the situation where a telephone conversation was overheard by means of an electronic listening and recording device which had been attached by agents of the Federal Bureau of Investigation to the outside of the public telephone booth from which the defendant had placed his call. The court established the principle that the Fourth Amendment protects people, not places, and since it had previously held in Silverman v. United States, 365 U.S. 505 (1961) that the interception of a conversation reasonably intended to be private could constitute a search and

seizure, it concluded that the absence of a physical penetration into the telephone booth was not critical.

However, the facts in Katz are clearly distinguishable from those in the instant case. Here, one party to the conversation consented to a federal narcotics agent listening in on the conversation, which was effected by means of a non-magnetic, non-electronic attachment to the receiver being used by the informant. Although such activity constituted a betrayal of the defendant's confidence, he did intend the informer to hear what he was told. The fact that the informer breached the confidence the defendant reposed in him by permitting Agent Figueroa to overhear the conversation does not violate any constitutional right of the defendant.

Justice White's comments in his concurring opinion in Katz appear to echo these sentiments:

"When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law abiding) associates. . . . It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another."

Katz v. United States, supra, at p. 589.

It is important to note that Justice White in his concurring opinion points to the following cases, decided by the Court previous to Katz and where no Fourth Amendment violations were found, as being left undisturbed by that decision:

1. Evidence obtained by an undercover police agent to whom a defendant speaks without knowledge that he is in the employ of the police. Hoffa v. United States, 385 U.S. 293 (1966).

2. Evidence obtained by a recording device hidden on the person of such an informant. Lopez v. United States, 373 U.S. 427 (1963); Osborn v. United States, 385 U.S. 323 (1966).

3. Evidence obtained by a policeman listening to the secret micro-wave transmissions of an agent conversing with the defendant in another location. On Lee v. United States, 343 U.S. 747 (1952).

Consideration should be given to the fact that in all of the foregoing cases, a face to face confrontation between the defendant and the agent was involved, while in the present case the defendant and the informant were conversing by telephone. Since extension telephones are commonplace, Lopez had much less reason to feel secure in his conversation with the informant than did the defendants in the cited cases.

At least one Circuit since the Katz case was decided has distinguished Katz on the basis discussed above.

Dryden v. United States, 5th Cir.,

March 22, 1968, No. 25368.

In Dryden, the appellant urged that it was error to admit

into evidence a tape recording of a telephone conversation between himself and the Government informer, where the recording was made with the permission of the informer. In affirming the conviction, the court pointed out that in Katz, the Supreme Court was careful to state that " 'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection' ".

By implication the quoted statement points up the risk inherent in any form of communication between two parties, viz., the risk of betrayal of the contents of the conversation by one of the parties. As Bradley and Hogan, in "Wiretapping: From Nardone to Benanti and Rathbun", 46 Georgetown Law Journal 418, 440 put it:

"If the recipient of the information is free to betray the confidence of the other party, what difference should the form of betrayal make? If he can repeat what he hears, if he can make notes of what he is told, if he can make a record of the conversation, is it not logical that he ought to be allowed to let a third person do these things for him?"

This Circuit has previously taken the position that listening in on a telephone conversation on an extension phone with the consent of one party does not constitute a search prohibited by the Fourth Amendment.

Olney v. United States, 380 F.2d 28

(9th Cir. 1967);

See also Todisco v. United States, 298 F.2d 208

(1961), finding no violation of the defendant's constitutional rights where the conversation between the agent and the defendant was broadcast by means of a miniature radio transmitter concealed on the agent's person without the defendant's knowledge.

The Tenth Circuit has also adopted the foregoing rationale.

In Rogers v. United States, 369 F.2d 944 (10th Cir. 1966), certain tape recordings of telephone conversations were admitted into evidence over the defendant's objection. In affirming the conviction, the court stated:

"The recording of a telephone conversation made by placing an induction coil on a previously placed and regularly used extension telephone, all of which is done with the knowledge, consent and permission of the party using the other extension, does not violate the Fourth or Fifth Amendment, nor is it prohibited by the Federal Communications Act."

Rogers v. United States, supra, at p. 946.

In Hoffa v. United States, supra, decided previous to Katz,

but left untouched by that decision, the Supreme Court found no Fourth Amendment violation on facts which differ from those in the instant case. The philosophy of that case however is plainly

applicable here. In that case, the defendant made incriminating statements to a Government agent in his hotel suite. The court stressed that the Fourth Amendment does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal the wrongdoing. Hoffa v. United States, supra, at pp. 302, 303. This type of a situation, it is contended, as well as that involved in the instant case, is left undisturbed by Katz. Clearly, Katz did not hold that overhearing a telephone conversation, where one party consents thereto, is an unreasonable search and seizure. Obviously, the main thrust of the newly adopted policy in Katz of protecting people, not places, is aimed at those instances where a conversation is listened to, no matter how or where it is effected, without the knowledge or consent of either party to the conversation, and where no warrant was obtained. This was the situation decried in Katz, but, as explained above, is not the situation presented here.

V

CONCLUSION

For the foregoing reasons it is requested that the decision of the trial court be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

ARNOLD G. REGARDIE,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

